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KMLZ VAT NEWSLETTER

VAT exempt advice of an investment management company

1. Background

An investment management company managed public funds as a special investment, according to the law on investment management companies that was then effective. For the management of the fund assets, the investment management company took advice from the *GfBk Gesellschaft für Börsenkommunikation (GfBk)*. The *GfBk* was not an investment management company itself.

According to the signed investment advisory contract, the *GfBk* was to “give recommendations for the purchase and sale of assets which were under the constant observation of the fund assets”. The *GfBk* was to “take into account the principle of risk spreading, the statutory investment restrictions (...) as well as the ... investment requirements”. The *GfBk* was remunerated according to a calculated percentage of the special investment's value.

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Just like the European Court of Justice (judgment of 07 March 2013, legal case C-275/11 – *GfBk*), the Federal Fiscal Court acknowledges, in its latest decision of 11 April 2013, V R 51/10, that advisory services regarding investment recommendations for investment management companies are VAT exempt. Consultants, who charge fees for advising investment management companies regarding the purchase and sale of securities for the investment management company's special investment, benefit from these judgments.

The *GfBk* provided the investment management company with recommendations regarding the purchase and sale of securities by telephone, fax or web server without first creating any detailed evaluations. The investment management company collected the evaluations which were produced into its order system for the purpose of checking them. As long as there was no violation of existing investment limits, the investment management company often implemented the *GfBk*'s recommendations within minutes. The investment management company did not make their own selection regarding recommendations for the composition of fund assets. However, the final decision and final responsibility remained with the investment management company. The *GfBk* received feedback concerning the execution of the recommendations as well as lists concerning the composition of the investment funds recommended by *GfBk* on a daily basis.



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2. Tax authority – tax court – Federal Fiscal Court – ECJ – Federal Fiscal Court

The *GfBk* applied for the advisory services to be regarded as VAT exempt during a tax audit. However, the tax authority regarded the services as being subject to VAT. An appeal against the tax authority ruling and a subsequent lawsuit commenced in the tax court were to no avail. The appointed Federal Fiscal Court submitted the question concerning zero-rating to the ECJ.

By judgment of 07 March 2013, the ECJ ruled that advisory services for securities funds provided to the investment management company by a third person as an administrator of a special investment are to be regarded as zero-rated. The Federal Fiscal Court followed the ECJ reasoning in its decision of 11 April 2013, V R 51/10. According to the Federal Fiscal Court, the advisory services provided by *GfBk* to the investment management company were zero-rated.

3. Conclusion for practice

3.1 Consultants of investment management companies

Consultants are to check which taxable periods from the past are still “pending/open”. It is to be evaluated for each taxable period whether a reference to the latest ECJ’s judgment makes sense.

It should be pointed out that the consultants usually issued invoices to the investment management company with a separate VAT amount. Therefore, if advisory services are VAT exempt, tax liability exists due to an incorrect tax classification. This tax liability can be cancelled by issuing corrected invoices. However, this does not apply retroactively. As a net remuneration “plus VAT” was usually agreed on in the consultancy contract, the issuing of corrected invoices might lead to the fact that, in many cases, the investment management company has to claim back the remitted VAT via civil proceedings. Therefore, the consultant is caught “between a rock and a hard place” with the tax authority on the one hand and the investment management company on the other.

The ongoing issuing of invoices should be converted into issuing gross invoices without a separate VAT amount. If supplies are treated as VAT exempt in the current VAT returns, one should disclose this information, in writing, to the tax authority in order to not subsequently be accused of evading tax.

3.2 Investment management company

Investment management companies should claim back remitted VAT from the consultants via civil proceedings. When doing this, the civil limitation of the right of unjust enrichment should be taken into account.